

## **HR Weekly Podcast**

**11/21/2007**

Today is November 21, 2007, and welcome to the HR weekly Podcast from the State Office of Human Resources. This week's topic concerns a recent court decision regarding the Equal Pay Act, or EPA, and the Older Workers Benefit Protection Act of 1990, or OWBPA.

Dorothy Graves, who was employed by Horry-Georgetown Technical College, filed suit against her employer citing a violation of the EPA and the OWBPA. Graves alleged that male employees who had similar jobs received higher wages and that she was forced to resign without having the opportunity to evaluate the effect it would have on her participation in the Teacher and Employee Retirement Incentive, or TERI, program.

The EPA is a federal law that abolished wage differences based on sex. To make a claim under the EPA, the plaintiff has the initial burden of proof to show that he or she receives less pay than an employee of the opposite sex performing a substantially equal job with the same work conditions. The United States Fourth Circuit Court of Appeals has required that the comparison has to be to a particular person and not a "hypothetical male or female." If the employee meets that burden of proof, the burden is then shifted to the employer. The employer then has to prove that the difference in pay is justified by one or more of the following: a merit system, a seniority system, a system that measures earnings by quality or quantity of production, or a differential based on any factor other than sex. If the employer does not meet this burden, the employee wins the lawsuit. If the employer meets this burden, the employee's claim fails, unless the employee can refute the employer's evidence.

The OWBPA is an amendment to the Age Discrimination in Employment Act, or ADEA, that provided certain requirements that must be met before individuals can waive their ADEA rights. Individuals may not waive any rights under the ADEA "unless that waiver is knowing and voluntary." The requirements include giving each employee at least 45 days to consider exit incentives or other employment termination programs.

Graves' EPA claim was dismissed on the grounds that she did not produce a job description or any indication that a male to whom she compared herself performed similar work under the same work conditions. In other words, she failed to meet the Fourth Circuit's requirement that the comparison has to be to a particular person.

Graves' OWBPA claim was also dismissed. Graves claimed that the college had not informed her of her TERI rights as required by the OWBPA. The court found that the OWBPA only provides specific requirements an employer must meet when seeking a release of ADEA claims from an employee. The court held that a violation of the OWBPA, by itself, does not establish age discrimination under the ADEA. Since Graves failed to cite a violation of the ADEA and "exhaust other administrative remedies," her OWBPA claim was dismissed.

Because Plaintiffs' attorneys may find EPA claims to be more beneficial for their clients, employers should be aware of the requirements of the EPA and, particularly, the statutory defenses. Employers should also be able to justify wage differences between jobs that might be similar in nature or work conditions in the event of an EPA claim. Furthermore, the court reminds us that the OWBPA is a set of requirements to follow to obtain a valid waiver of ADEA claims. It is not a separate claim for the unforeseen impact on an employee's benefits irrespective of a violation of the ADEA.

For more information about the EPA or OWBPA, please call your legal representative or your HR consultant at 737-0900.

Thank you.